IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1052

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D.C. CHAPTER, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D.C. CHAPTER, IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the District Court, which has been informally reported at 14 FEP Cases 83 (D.D.C., 1976), appears in the Petition for Certiorari, Pet. App. A at 1a, et seq.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Respondent believes that the Petition properly presents the following questions:

(1) Whether Federal contract compliance agencies, none of which are the Equal Employment Opportunity Commission, are barred by 42 U.S.C. §2000e-8(e), as incorporated in exemption (b)(3) of the Freedom of Information Act, 5 U.S.C. §552(b)(3), from disclosing EEO-1 reports filed by Federal contractors pursuant to Executive Order 11246 as amended?

(2) Whether EEO-1 reports and limited parts of AAPs are exempt from disclosure under exemption (b)(3) of the FOIA because of 18 U.S.C. §1905?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition at pp. 3-5, one other authority is relevant.

The pertinent regulation of the Office of Federal Contract Compliance Programs, 41 C.F.R. 60-40.4, provides in full:

> §60-40.4. Information disclosure of which is prohibited by law.
>
> The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of Title VII of that Act and its disclosure by employees of the EEOC.

STATEMENT OF THE CASE

Respondent D.C. NOW believes that certain facts in addition to those in the Petitioners' statement of the case are relevant to the Court's consideration of the Petition.

Petitioners Prudential, Metropolitan, and John Hancock, all federal government contractors, have filed EEO-1 reports[1] and other equal employment opportunity

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[1] EEO-1 reports, or Standard Form 100's, require a statistical breakdown of the employer's workforce into nine broad categories by race, sex, and national origin. A sample EEO-1 form is set forth in the Petition for Certiorari, Pet. App. F, at 64a-65a.

data, which Respondent National Organization for Women, Washington, D.C. Chapter ("D.C." NOW") seeks, with the Insurance Compliance Staff of the Social Security Administration ("ICS").[2] The Office of Federal Contract Compliance Programs ("OFCCP") of the Department of Labor, the office which has primary enforcement responsibility for Executive Order 11246, as amended, 3 C.F.R. at 169 et seq., has designated ICS as the contract compliance agency for the insurance industry. The Executive Order requires that government contractors not discriminate in employment on the basis of race, sex, religion or national origin. OFCCP has promulgated regulations to implement the Executive Order, including a requirement that government contractors file EEO-1s, and certain

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[2]Mechanically, the Petitioners, like all other government contractors, file EEO-1 forms with the Joint Reporting Committee, an agency which collects and funnels forms to each federal agency with which they must be filed. The forms directed to ICS never pass through the custody of EEOC. The procedure serves the convenience of the companies, see infra, pp. 15-16, but does not affect legal requirements for disclosure. See, e.g. Sears, Roebuck & Co. v. General Services Administration, 509 F.2d 527, 529 (D.C. Cir. 1974); Legal Aid Society of Alameda County v. Shultz, 349 F.Supp. 771, 775-6 (N.D. Calif. 1972).

Affirmative Action Plans ("AAPs"),[3] with the designated compliance agency.[4]

OFCCP regulations promulgated pursuant to the Executive Order put all federal contractors on notice that EEO-1 forms which federal contractors submit to a contract compliance agency such as ICS are subject to public disclosure, notwithstanding §709(e) of the 1964 Civil Rights Act, 42 U.S.C. §2000e-8(e). 41 C.F.R. §60-40.4. Such disclosure is an integral part of doing business with the government.

On January 19, 1977, all three petitioners filed with this Court applications for stays pending the filing of this Petition for Certiorari and a decision thereon.[5] Those stay applications differed significantly. Neither John Hancock nor Prudential requested that this Court stay disclosure of those

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[3]Although AAPs are prepared for each establishment, they are submitted to the compliance agency only upon its request. 41 C.F.R. §60-60.3

[4]See C.F.R. §60-1.7 and §60-2, et seq.

[5]This case is also pending on appeal in the U.S. Court of Appeals for the District of Columbia Circuit on cross-appeals taken by D.C. NOW, the three companies and the federal parties. The brief of appellant/cross-appellee D.C. NOW was filed in that Court on March 21, 1977.

portions of the AAPs which the District Court had found must be disclosed under the FOIA and as to which it denied preliminary injunctions. For those two companies, therefore, the only materials at issue here are their EEO-1 reports. Only Metropolitan contests the release of those limited portions of company AAPs that the District Court found disclosable under the FOIA, although all three companies are competitors. Metropolitan sets forth no special reasons why disclosure of its AAP material--which the District Court found as a matter of fact would not cause substantial competitive harm--is barred by the FOIA.[6]

ARGUMENT

I. CERTIORARI BEFORE JUDGMENT IS AN EXTRAORDINARY REMEDY UNWARRANTED IN THIS CASE.

Certiorari before judgment, requested by the Petitioners here, is rarely granted. U.S. Supreme Court Rule 20; Stern & Gressman, Supreme Court Practice

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[6]Petitioners' failure to describe Metropolitan's AAP material in any detail, or to indicate clearly that it is material which the District Court found would not in any event be covered under 18 U.S.C. §1905 because disclosure would not cause substantial competitive harm (see Pet. App. A, at 26a) demonstrates that Metropolitan's AAP material is not the primary focus of the Petition in this case.

(1969), §4.21 at 183. The remedy is available in only two circumstances, neither of which is present here.

First, the case is not one involving issues of such imperative public importance as to require deviation from normal appellate processes. The case presents no constitutional issues at all, much less any of great significance. The fate of the nation does not ride on the outcome of this case in the way it may have rested on decisions in such cases as United States v. Nixon, 418 U.S. 683 (1974); and Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), cases in which Rule 20 was applied appropriately. Nor does pressure of time prohibit or limit recourse to a Court of Appeals.[7] Matters with far greater

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[7]Petitioners suggest that the only way they can have their case reviewed by this Court is by certiorari before judgment. But they were not barred from seeking relief first from the Court of Appeals, where the issues could have been more carefully delineated, the Court could have considered whether to follow its earlier rulings, and a decision with a statement of the facts and the law helpful to this Court would have been provided. Nor did the companies seek stays from the Court of Appeals or from this Court to permit an appeal to the Court of Appeals. Neither John Hancock nor Metropolitan has ever requested a stay pending appeal from the Court of Appeals or from this Court,

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urgency and constitutional significance have been considered by this Court only after review by the United States Court of Appeals. See, e.g. New York Times v. United States, 403 U.S. 713 (1971) (Pentagon Papers); Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917 (1971) (underground nuclear explosion at Amchikta Island, Alaska).[8]

Second, despite Petitioners' claims, no case raising the same or similar questions of law is already pending before this Court. Petitioners suggest that related questions may be presented if this Court grants a petition for certiorari filed on February 28, 1977 in Brown v. Westinghouse Electric Corp., Pet. No. 96-1192, seeking review of Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976). Pendency of a petition for certiorari does not, however, meet the

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and Prudential first requested such a stay pending appeal in its Reply to the Government's Opposition to Stay, filed on March 11, 1977 in Nos. A-586, A-587, and A-588.

[8]The remedy of certiorari before judgment is so extraordinary that Respondents' counsel have found only one case, United States v. Nixon, supra, in which certiorari before judgement was granted during the past five years solely because of the importance of the case.

necessary criteria for application of Rule 20. That Rule has been applied, on limited occasions, when the same parties were involved in the case already pending as well as in the one for which certiorari before judgment was requested. See, e.g. New Haven Inclusion Cases, 399 U.S. 392, 418, cert. granted, 396 U.S. 1056 (1970); Hannah v. Larche, 363 U.S. 420 (1960). The same parties are not involved here.

Also, on rare occasions this Court has granted certiorari before judgment when a case with clearly similar issues had already been accepted for consideration by this Court. To counsel's knowledge, no response has yet been filed to the Petition for a Writ of Certiorari in Westinghouse, supra, and certiorari has not been granted.

Even if this Court grants certiorari in Westinghouse, it should not grant certiorari before judgment here because the cases raise altogether different issues.[9]

First, Westinghouse and the instant case involve different industries, with different competitive consequences for disclosure.

Second, the companies in the Westinghouse case did not prevail on the

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[9]Cf. Petition herein at 3; Petition in Westinghouse, supra, at 2.

issue of whether §709(e) barred disclosure of materials filed under the federal contract compliance program, and did not cross-petition for certiorari on that issue. Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1199. Therefore, that issue, raised by Petitioners here, cannot be before this Court in Westinghouse.

Third, the second issue raised by Petitioners here--whether §1905 is included in exemption (b)(3) of the FOIA, and therefore whether certain material covered by §1905 is exempt from disclosure under the FOIA--is also not presented in Westinghouse. Rather, that case raises the question whether material already found exempt from disclosure under the FOIA can be released nevertheless as a matter of agency discretion.

Finally, neither of the questions raised in the Westinghouse petition for certiorari is presented here.[10]

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[10]The Petition for Certiorari in Westinghouse first asks this Court to consider whether the agency can exercise discretion to permit disclosure of material exempt from mandatory disclosure under the FOIA, and then asks what standard of review is appropriate for agency decisions to disclose information. The first question differs from that presented here. See supra, p. 10. The second question in the Westinghouse Petition is not presented because in the instant

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Therefore, these cases do not present the same or similar issues for review.

Furthermore, even if a case is pending which raises the same or similar issues, that alone is not sufficient for this Court to grant certiorari before judgment. To be considered, the additional case should present a helpful complement to the earlier case by better illuminating the issues presented. The usual procedure for most related cases is for litigants to take an appeal to the Court of Appeals, and request that the appellate courts defer consideration of cases until the Supreme Court acts on the related case. To depart from that procedure will cause untold clogging of this Court with applications for certiorari in marginally related cases, and impose a great burden on this Court.

II. THE DISTRICT COURT PROPERLY HELD THAT SECTION 709(e) DID NOT BAR DISCLOSURE BY AGENCIES OTHER THAN EEOC OR EEO-1 REPORTS FILED PURSUANT TO EXECUTIVE ORDER 11246 AS AMENDED.

In the instant case, the District Court judge held that the prohibition on disclosure of documents in 42 U.S.C. §2000e-8(e), §709(e) of the

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case the companies were afforded de novo review in the District Court, and have therefore not raised the issue here.

Equal Employment Opportunity Act, applied only to officers and employees of the EEOC. The holding relied on a series of decisions which "uniformly rejected" such arguments. Pet. App. A, at 8a-9a.[11] The ruling was eminently correct; in fact, no Circuit Court which has considered the issue has held otherwise. Sears, Roebuck & Co. v. General Services Administration, supra, 509 F.2d at 529. Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1199.[12]

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[11]The District Court also rejected out of hand John Hancock's contention about the applicability of 44 U.S.C. §3508, which subjects agencies receiving documents from another agency to the same disclosure restrictions as the original agency. Ibid. Since the ICS does not receive the EEO-1 forms from the EEOC, whose officials are the only ones expressly covered by §709(e), §3508 must be inapplicable. The only Circuit Court of Appeals ruling on the issue has so found. Sears, Roebuck & Co. v. General Services Administration, supra, 509 F.2d at 529.

[12]Almost all the District Courts that have ruled on the disclosability of EEO-1s by contract compliance agencies have found that §709(e) does not exempt them from disclosure under the (b)(3) exemption of the FOIA. Chrysler Corp. v. Schlesinger, 412 F.Supp. 171, 175 (D. Del. 1976)(on appeal); Crown Central Petroleum Corp. v. Kleppe, 14 FEP Cases 49 (D. Md. 1976); Robertson v. Department

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Moreover, the reasons for the District Court's ruling are sound. The insurance companies filed their EEO-1 forms with the ICS,[13] not with the EEOC. The forms were filed pursuant to requirements in regulations implementing Executive Order 11246, as amended, not pursuant to requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Also, officials of ICS, not officials of EEOC, are those who were asked to disclose, and who now seek to disclose, the EEO-1 forms requested.

Congress has recently reaffirmed its intent to limit applicability of §709(e) to officials of the EEOC. In the Government in the Sunshine Act, P.L. 94-409 (Sept. 13, 1976), it clarified the scope of exemption (b)(3). The

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of Defense, 402 F.Supp. 1342 (D.D.C. 1975); Lawyers Cooperative Publishing Co. v. Schlesinger, Civ. Action No. 74-212 (W.D.N.Y. April 22, 1975)(Slip op. at 3); Legal Aid Society of Alameda County v. Shultz, supra, 349 F.Supp. at 775-76 (N.D. Cal. 1972); contra, Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976).

In Chamber of Commerce v. Legal Aid Society of Alameda County, 423 U.S. 1309 (1975), relied on by Petitioners, Justice Douglas, acting as Circuit Justice during the Court's summer recess, denied a stay of disclosure of EEO-1 forms.

[13]See also supra, p. 4, n. 2.

House Report supporting that law states:

> "Section 5(b) amends exemption (3) of the Freedom of Information Act... to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1972)... Examples of statutes that could justify withholding under the amended exemption (3) includes [sic] sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e-5(b), 2000e-8(e) and section 314(a)(3) of the Federal Election Campaign Act (2 U.S.C. §437g(a)(3), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively to withhold certain information relating to informal conciliation and enforcement efforts..." H. Rep. No. 94-880, 94th Cong., 2nd Sess., pp. 22-23 (1976). (emphasis added.)

The House provision was adopted and its purpose reaffirmed by the Conference Committee. See H. Conf. Rep. No. 94-1441, 94th Cong., 2nd Sess., at 25 (1976).

Of course, the OFCCP enforcement mechanism grows out of a term in a contract between the government and Petitioners. See 41 C.F.R. §60-1.4(a). If Petitioners do not wish disclosure of documents submitted under that pro-

gram, they can simply decline the contract.

Moreover, limiting the applicability of §709(e) to the EEOC is sensible and serves the convenience of contractors like Petitioners. That limit increases the likelihood that federal contractors such as Petitioners will be asked to complete a single form providing information useful to a number of federal agencies, rather than several forms seeking similar data. OFCCP regulations require disclosure of EEO-1 forms,[14] and the agency maintains that disclosure is helpful in securing compliance with equal employment laws which it enforces.[15] If §709(e) were held applicable to the forms, rather than to the agency using the forms, OFCCP could simply place a disclaimer on the form, or request the same information on a form with a different name and number.

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[14]See 41 C.F.R. §60-40.4, set forth at p. 2, supra. This clear regulation was in force at the time Petitioners filed their EEO-1 forms for use by OFCCP and ICS. It counters Petitioners' arguments that they were not on notice that ICS and OFCCP would disclose the EEO-1 forms.

[15]See Affidavit of Stephen Ronfeldt and Russell Galloway, Exhibit 2 to D.C. NOW Opposition to Petitioners' Request for Stay Pending Certiorari Before Judgment, filed on January 19, 1977 in Nos. A-586, A-587 and A-588.

Therefore, a ruling that §709(e) applies to officials of agencies other than the EEOC, and bars disclosure of the documents at issue here, would disregard the express language of §709(e), and would be futile.

In the face of the clear language of §709(e), the stated intent of Congress to limit its applicability to the EEOC, and the good sense of such a rule, Petitioners' arguments for another interpretation do not raise a substantial legal question appropriate for certiorari before judgment.

III. THIS COURT NEED NOT CONSIDER THE SECOND ISSUE PRESENTED FOR REVIEW SINCE §1905 IS INAPPLICABLE TO THE MATERIAL AT ISSUE, AND EVEN IF IT WERE APPLICABLE, THE CONFLICT IN THE CIRCUITS AS TO WHETHER MATERIAL COVERED BY §1905 IS EXEMPT FROM DISCLOSURE UNDER EXEMPTION (b)(3) HAS BEEN RESOLVED BY RECENT LEGISLATIVE AMENDMENTS.

Petitioners ask this Court to determine whether 18 U.S.C. §1905 is incorporated in exemption (b)(3) of the FOIA, which exempts from mandatory disclosure information barred from disclosure by other statutes. However, the EEO-1 forms and limited AAP information at issue here is not covered by §1905; therefore, on the facts of this case, the legal issue is only hypothetical and would not affect the outcome of whether the material must be disclosed.

First, on its face 18 U.S.C. §1905 is inapplicable to the material at issue here. Section 1905 does not prohibit disclosure "authorized by law." See text of §1905, Pet. at 5. Disclosure of the equal employment materials at issue here is authorized by law. OFCCP has issued regulations requiring disclosure of EEO-1s and AAPs. See e.g. 41 C.F.R. §60-40.2(b), 41 C.F.R. §60-40.3, 41 C.F.R. §60-40.4.[16] Since disclosure of the material which the District Court found exempt is otherwise authorized by law, it is not barred from disclosure by §1905.

On a second ground as well the material is not covered by §1905. Courts

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[16]These regulations are promulgated pursuant to authority conferred on the Department of Labor by federal Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303, 3 C.F.R. at 169 et seq., prohibiting government contractors from discriminating in employment practices. Executive Order 11246 provides at §201: "The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." That these regulations have the force and effect of law is beyond dispute. See, e.g. Paul v. United States, 371 U.S. 245, 255 (1963); Vitarelli v. Seaton, 359 U.S. 535, 540 (1959).

have repeatedly held that material barred from disclosure under §1905 is the same as that which is exempt from disclosure under FOIA exemption (b)(4). See, e.g. Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941, n. 7 (D.C. Cir. 1975); Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1204, n. 38. Since the District Court determined that none of the information at issue before this Court fell within the (b)(4) exemption because disclosure would not cause substantial competitive harm to Petitioners, on the facts as well the material at issue is not covered by §1905. Therefore, even if this Court reached the hypothetical legal question for which Petitioners seek certiorari, and determined as petitioners urge that §1905 is one of the statutes covered by exemption (b)(3), the information before this Court would not be exempt from disclosure under the FOIA.

Furthermore, while it is true that the two Circuits which have considered whether §1905 is within the (b)(3) exemption of the FOIA have split on the issue, recent legislative amendments to the FOIA have resolved the conflict. In September, 1976, shortly before the Fourth Circuit decided Westinghouse, supra, Congress amended (b)(3) to clarify its scope. The amendment was expressly designed to reverse the holding of this Court in Administrator, FAA v. Robertson, 422 F.2d 255 (1975), on which the companies in the instant case and the Court in Westinghouse, supra, relied to establish that §1905 is covered by exemption (b)(3). See Pet. App.

at 22-25; Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1199-1203.[17] The Westinghouse Court did not consider the new legislation.[18] The

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[17]See S. Conf. Rep. No. 94-1178, 94th Cong., 2nd Sess., at 24-25 (1976); House Conf. Rep. No. 94-1441, 94th Cong., 2nd Sess., at 25 (1976). The House Report on the bill, H. Rep. No. 94-880, 94th Cong., 2nd Sess., p. 23 (1976) provided:

> "Under the amendment,... the Trade Secrets Act, 18 U.S.C. §1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding..." (emphasis supplied).

[18]It is possible that the Fourth Circuit did not consider the new legislation because the provisions did not take effect until March 13, 1977. In that case, its ruling has no precedential value at this time, and is not appropriate for consideration by this Court.

District of Columbia Circuit, on the other hand, has reconsidered its earlier decisions that §1905 is not within exemption (b)(3) in light of the recent amendments, and has determined that, a fortiori, §1905 is not covered by exemption (b)(3). See National Parks and Conservation Assn. v. Kleppe, 547 F.2d 673, 678 (D.C. Cir. 1976). Until the Fourth Circuit considers whether the recent FOIA amendment changes its ruling,[19] and until other Circuits have considered the affect of the new law on the scope of exemption (b)(3), consideration by this Court of any "conflict" in the Circuits is clearly premature.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

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[19]Petitioners have suggested that the Government should have asked the Fourth Circuit to review Westinghouse in light of the FOIA amendments, rather than petitioning this Court for certiorari in that case. See Prudential Response to Stay Opposition, at pp. 4-5, n. 2. The failure of the Government to take that course makes it all the more inappropriate for this Court to consider the matter before the Fourth Circuit has had an opportunity to reconsider its ruling in Westinghouse or another case in light of the 1976 FOIA amendments.

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